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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 GLADYS ESQUIVEL,) No. ED CV 10-00864-VBK
12)
13 Plaintiff,) MEMORANDUM OPINION
14) AND ORDER
15 v.)
16) (Social Security Case)
17 MICHAEL J. ASTRUE,)
18 Commissioner of Social)
19 Security,)
20 Defendant.)
21 _____)
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18 This matter is before the Court for review of the decision by the
19 Commissioner of Social Security denying Plaintiff's application for
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have
21 consented that the case may be handled by the Magistrate Judge. The
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to
23 enter judgment upon the pleadings and transcript of the Administrative
24 Record ("AR") before the Commissioner. The parties have filed the
25 Joint Stipulation ("JS"), and the Commissioner has filed the certified
26 AR.

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") properly

complied with the order of the Appeal Council; and

2. Whether there is a DOT inconsistency in the ALJ's holding that Plaintiff can perform the jobs of kitchen helper, packager and cleaner.

(JS at 3.)

This Memorandum Opinion will constitute the Court's findings of fact and conclusions of law. After reviewing the matter, the Court concludes that for the reasons set forth, the decision of the Commissioner must be reversed.

I

THE ISSUE OF WHETHER THE ALJ COMPLIED WITH THE ORDER OF REMAND OF
THE APPEALS COUNCIL IS NOT WITHIN THE JURISDICTION OF THIS COURT.

ALTERNATIVELY, THE ALJ DID NOT FAIL TO DEVELOP THE RECORD.

Plaintiff contends in her first issue that the ALJ did not properly comply with the Order of the Appeals Council remanding the case to the Administrative Law Judge. (JS at 3, et seq., citing AR 105-106.)

Following issuance of a decision by the ALJ on August 18, 2008, the Appeals Council issued an Order remanding the case to the ALJ for further hearing. The Appeals Council ordered that upon remand, the Administrative Law Judge will, among other things, do the following:

"Obtain additional evidence concerning the [Plaintiff's] mood disorder/depression in order to complete the administrative record in accordance with the regulatory standards regarding consultative examinations and existing medical evidence (20 CFR 404.1512-1513). The additional

1 evidence should include updated treatment records from Dr.
2 Nakai and Patricia Jennings, the treating marriage and
3 family therapist, and updated records from Dr. Pham. The
4 additional evidence may include, if warranted and available,
5 a consultative mental status examination with psychological
6 testing and medical source statements about what the
7 [Plaintiff] can still do despite the impairments."

8 (AR 105-106.)
9

10 Plaintiff specifically complains that the ALJ failed to obtain
11 additional updated treatment records from Dr. Nakai and Patricia
12 Jennings, the treating marriage and family therapist, and updated
13 records from Dr. Pham.

14 In his decision following the remand directive from the Appeals
15 Council (AR 8-17), the ALJ cited and relied upon a report that had
16 been obtained following the Appeals Council Order by Dr. Bagner, on
17 September 13, 2009. (AR 580-583.) Dr. Bagner had performed a complete
18 psychiatric evaluation on that date at the request of the Department
19 of Social Services. The ALJ adopted Dr. Bagner's findings as
20 "generally consistent with the residual functional capacity found
21 herein." (AR 14.)

22 Following this decision, Plaintiff requested review by the
23 Appeals Council (AR 4), which on April 22, 2010 denied review (AR 1-
24 3.)

25 As framed, Plaintiff's issue is not justiciable by this Court.
26 When the Appeals Council denied Plaintiff's request for review of the
27 ALJ's decision, that decision became the final decision of the
28 Commissioner, subject to judicial review. See 42 U.S.C. § 405(g).

1 Federal courts have jurisdiction only to review final decisions of
2 administrative agencies. Thus, when the Appeals Council denied review
3 of the ALJ's second decision, and made that decision final, by doing
4 so it declined to find that the ALJ had not complied with its remand
5 instructions. See Tyler v. Astrue, 3005 Fed.Appx. 331 (9th Cir. 2008);
6 Thompson v. Astrue, 2010 WL 2991488 (C.D. Cal. 2010).

7 If Plaintiff's claim is construed as an argument that the ALJ
8 failed to develop the record, it still fails. As noted, the ALJ did
9 obtain a complete consultative psychiatric evaluation following
10 remand. Consequently, there was no failure to develop evidence
11 regarding Plaintiff's mental impairment.

12 Plaintiff's first issue is therefore deemed without merit.

13 14 II

15 THIS CASE MUST BE REMANDED FOR FURTHER HEARING 16 TO ADDRESS AN INCONSISTENCY BETWEEN THE JOBS IDENTIFIED 17 AT STEP FIVE OF THE SEQUENTIAL EVALUATION PROCESS 18 AND PLAINTIFF'S RESIDUAL FUNCTIONAL CAPACITY

19 A vocational expert ("VE") testified at the second hearing, which
20 occurred on February 2, 2010. (AR 20-44.) The ALJ posed a
21 hypothetical question to the VE which incorporated certain functional
22 limitations assessed by Dr. To, who performed an independent internal
23 medicine evaluation at the request of the Department of Social
24 Services on August 15, 2009. (AR 574-579.) One of those functional
25 restrictions, which the ALJ incorporated in the hypothetical question,
26 contained a restriction from working with "heavy and moving
27 machineries." (See also AR 13, note 5.) Considering this
28 hypothetical, the VE identified three jobs which Plaintiff could

1 perform: cook's helper; hand packager; and industrial cleaner. (AR
2 43.) As Plaintiff points out, and the Commissioner does not dispute,
3 each of these jobs are identified by Dictionary of Occupational Titles
4 ("DOT") codes which contain job descriptions, and each of these job
5 descriptions involves working with machinery which might be construed
6 as heavy and/or moving machinery. For example, the cook's helper job
7 (DOT Code 317.687-010) entails "clean[ing], cut[ting]; and grind[ing]
8 meats, poultry and seafood." The second job, hand packager (DOT Code
9 920.587-018), entails the following: "starts, stops, and regulates
10 speed of conveyer." Finally, the third job, that of industrial
11 cleaner (DOT Code 381.687-018), might require a worker to clean
12 conveyers, pick up refuse by cutting grass or shoveling snow, operate
13 an industrial truck to transport materials within a plant, start pumps
14 to force cleaning solution through machinery, and start pumps to
15 lubricate machines.

16 Plaintiff cites the Ninth Circuit case of Pinto v. Massanari, 249
17 F.3d 847 (9th Cir. 2001) for its holding that in order for an ALJ rely
18 on job description in the Dictionary of Occupational Titles that fails
19 to comport with a claimant's noted limitation, the ALJ must
20 definitively explain this deviation. Further, Plaintiff argues that
21 under Ninth Circuit precedent, an ALJ "may rely on expert testimony
22 which contradicts the DOT, but only insofar as the record contains
23 persuasive evidence to support the deviation." (JS at 14, citing Light
24 v. Social Security Administration, 119 F.3d 1428, 1435.

25 The Commissioner puts forth a two-part argument. First, that
26 there is no deviation between the identified jobs and Plaintiff's
27 residual functional capacity ("RFC"), because the DOT only lists the
28 maximum requirements of jobs as generally performed, not the range of

1 requirements of a particular job as performed in specific settings.
2 (JS at 17, citing Social Security Ruling ("SSR") 00-4p.) Second,
3 Plaintiff argues that the job descriptions contained in the DOT do not
4 entail the use of dangerous equipment, or, specifically, heavy and
5 moving machinery. For the following reasons, the Court rejects both
6 of these contentions.

7 First, as to the issue of deviation from the DOT descriptions,
8 the Ninth Circuit's decision in Massachi v. Astrue, 486 F.3d 1149 (9th
9 Cir. 2007) addressed this issue in the context of interpreting SSR 00-
10 4p. As Massachi makes clear, SSR 00-4p provides unambiguous guidance
11 which requires the adjudicator to discharge an affirmative
12 responsibility to ask about any possible conflict between VE evidence
13 and information provided in the DOT. (Id. at 1152.) As Massachi
14 noted, these procedural requirements "ensure that the record is clear
15 as to why an ALJ relied on a vocational expert's testimony,
16 particularly in cases where the expert's testimony conflicts with the
17 [DOT]." (Id. at 1153.) The DOT descriptions of each of the three
18 identified jobs in this case clearly entail the use of heavy and/or
19 moving machinery, such as conveyer belts, pumps, grinders, and the
20 like. The Commissioner's argument that the use of such machinery is
21 only a maximum requirement of a job as it is generally performed, is
22 a question which should have been submitted to the VE. The
23 Commissioner does not have the expertise of a vocational expert, and
24 thus cannot provide such evidence. That is the point of the opinion
25 in Massachi. There is a possible deviation here between the job
26 requirements and Plaintiff's RFC, and that must be explained by expert
27 testimony. At the second hearing, the ALJ did not ask the VE whether
28 there was or might be a variance between the identified jobs in the

1 DOT and the functional limitations set forth in the hypothetical
2 question. This has created a gap in the evidence which cannot be
3 filled by speculation. Further, the Commissioner's interpretation of
4 Plaintiff's argument is incorrect. She does not argue that the issue
5 is whether she can operate what the Commissioner calls "dangerous
6 equipment." Rather, Plaintiff sticks to the RFC as defined by the ALJ
7 which precludes her from operating heavy and moving machinery. These
8 questions must be resolved on remand by expert testimony.

9 For the foregoing reasons, this matter is remanded for further
10 hearing consistent with this Memorandum Opinion.

11 **IT IS SO ORDERED.**

12
13 DATED: February 28, 2011

14 /s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE